Case No. 83-96

IN THE

Supreme Court of the United States

October Term 1982

JOANNE LIMBACH,
TAX COMMISSIONER OF OHIO,

Petitioner,

v.

THE HOOVEN & ALLISON COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. NIMS
Counsel of Record

KENNETH E. UPDEGRAFT, JR.
CHARLES H. MOELLENBERG, JR.
JONES, DAY, REAVIS & POGUE
1700 Union Commerce
Building
Cleveland, Ohio 44115
(216) 696-3939

Attorneys for Respondent

TABLE OF AUTHORITIES

ARGUMENT

In attempting to fashion an argument in support of its position that this Court should issue its writ of certiorari, petitioner strives to characterize the opinion of the Ohio Supreme Court as being somehow revolutionary. In fact, the Supreme Court of Ohio simply followed a proposition of law which is unassailable. The Supreme Court of Ohio quite properly held that the decision of this Court in *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945), is controlling until such time, if ever, as this Court overrules that decision. Such deference by a state court to the decision of this Court on a question of federal law is hardly revolutionary and cannot possibly provide a basis for the issuance of a writ of certiorari.

Petitioner is really arguing that this Court must have intended to overrule its decision in *Hooven* when it decided *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976). However, as the Supreme Court of Ohio correctly noted, this Court very clearly indicated in *Michelin* that it was overruling only its decision in *Low* v. *Austin*, 80 U.S. (13 Wall.) 29 (1872). *Michelin*, 423 U.S. at 301. This Court did not overrule its prior decision in *Hooven*. Indeed, this Court in *Michelin* acknowledged its awareness of its decision in *Hooven*, but stated that the *Hooven* decision had raised constitutional questions in another context. *Michelin*, 423 U.S. at 301, n. 13.

The issue before this Court in *Michelin* was limited to the facts respecting imported tires held for sale. The Court expressly stated that the issue of the right of a state to tax imported tubes held for subsequent incorporation into tires was not before it. *Michelin*, 423 U.S. at 279, n. 2. The issue in this case of state taxation of imported raw materials held in inventory for use in manufacturing was thus not decided in *Michelin*. This Court followed

traditional jurisprudential principles in limiting its analysis to the issue which was in fact before it and did not resolve different issues which were not factually developed and which were not in fact before it.

The issues raised in this case with respect to a state's attempt to tax imported raw materials which are yet to be incorporated into a saleable product are very different from the issues raised in *Michelin* by a tax on finished goods. Hooven & Allison Company must import the fiber materials, such as hemp, sisal and jute, used in its various rope products. In doing so, it is compelled to pay a premium price in order to obtain these fibers, because the third world countries which export fibers impose a pricing structure that attempts to encourage rope manufacturers to locate their production facilities in those third world countries. Certain third world countries also sell finished rope products for export at prices very close to the prices set for exported fibers. In this manner, the third world countries seek to discriminate against exported raw materials in favor of exported finished rope products.

Despite this economic premium which is exacted, Hooven & Allison Company has resisted the pressure to move its operations overseas and has maintained its manufacturing facilities in Ohio. The impact of a state property tax in this situation is very different from the situation presented in *Michelin*, in which Michelin Tire Company was perceived to have an advantage over domestic tire manufacturers when it was insulated from personal property taxes on its inventory of finished goods held for sale. There are no domestic producers of those types of fibers imported by Hooven & Allison Company, and thus the economic issues are very different. These economic differences underscore the wisdom with which this Court acted in limiting its decision in *Michelin* to the facts in that case,

and in deciding not to overrule its prior decision in *Hooven*.

The other arguments advanced by petitioner are also unpersuasive. Petitioner argues that the Supreme Court of Ohio ignored the decision of this Court in *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591 (1948). The *Sunnen* decision was not ignored; it was simply not applicable. *Sunnen* stands for nothing more than the proposition that tax issues can change in different tax years. *Sunnen* does not indicate that controlling principles of federal constitutional law enunciated by this Court should be ignored by a state court. Thus, this Court in *Montana v. United States*, 440 U.S. 147 (1979), limited the *Sunnen* doctrine to situations in which the controlling law or the relevant facts had changed materially. Otherwise, a prior decision on the identical tax issue was held to be dispositive in any attempt to relitigate the same issue. In this case, the facts and the law have not changed materially since this Court decided *Hooven*. Therefore, *Sunnen* is not pertinent to this case.

Petitioner also argues that the impact of the decision by the Supreme Court of Ohio is unfair because it somehow extends a protection to Hooven & Allison Company which no other company enjoys. This argument is ridiculous. The Supreme Court of Ohio held only that this Court has not overruled *Hooven*. Consequently, any taxpayer who believes that *Hooven* articulates the controlling principle of law in its case can rely on *Hooven*. Its impact is in no way limited to respondent. Indeed, petitioner contradicts its own argument by also attempting to attribute importance to this case by claiming that other companies are placing reliance on the decision. Since *Hooven* continues to express the controlling principles of law as enunciated by this Court, it is hardly surprising that other taxpayers are citing the decision.

In the final analysis, petitioner is really arguing only that this Court should re-examine its decision in *Hooven*. However, petitioner advances no reason in support of such re-examination. Petitioner ignores the economic differences between the competitive advantage at issue in *Michelin* and the competitive disadvantage which Hooven & Allison Company would suffer in relation to domestic manufacturers of synthetic cordage and foreign manufacturers of natural fiber cordage if its imported raw materials were subject to state property tax when there is no domestic source for such raw materials. Rather than stating any reasons in support of a need to re-examine *Hooven*, petitioner tries to convince the Court that it has somehow already implicitly overruled *Hooven* even though it refrained from doing so expressly. The fact is that the issues in this case are very different from those considered in *Michelin*. Therefore, petitioner has not established any reason for this Court to re-examine *Hooven*.

Moreover, this case would provide a very poor vehicle for any re-examination of *Hooven* because of the absence of any factual record. Since petitioner chose to argue below that *Hooven* had already been overruled, petitioner made no attempt to develop a factual record as to why the case should be overruled. The Supreme Court of Ohio quite properly held that *Hooven* had not been overruled. Accordingly, the Supreme Court of Ohio did not attempt to develop or review a factual record. Hence, even if *Hooven* were to be re-examined, this case would provide no basis for any meaningful review, because petitioner did not develop a factual record in the Ohio litigation. Therefore, this case does not provide the factual record necessary for proper consideration of the constitutional questions presented by state taxation of imported raw materials held for use in manufacturing.

CONCLUSION

The Supreme Court of Ohio did nothing more than follow an unassailable proposition of law: A state court must follow a controlling decision of this Court on an issue of federal law. Petitioner tried to argue before the Supreme Court of Ohio that the *Hooven* decision had been implicitly overruled, but this argument was properly rejected. This Court has never overruled *Hooven*. Further, because petitioner did not develop a factual record on the constitutional issues, this case would totally fail to provide any meaningful basis for re-examining *Hooven*, even if such re-examination were thought to be desirable. Finally, no need whatsoever has been shown for any such re-examination of *Hooven*. Therefore, the petition for writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. NIMS
Counsel of Record

KENNETH E. UPDEGRAFT, JR.
CHARLES H. MOELLENBERG, JR.
JONES, DAY, REAVIS & POGUE
1700 Union Commerce Building
Cleveland, Ohio 44115
(216) 696-3939

Attorneys for Respondent
The Hooven & Allison Company

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served on petitioner by forwarding such copies to Richard C. Farrin, 30 East Broad Street, Columbus, Ohio 43215, Counsel for petitioner, by United States mail, this 17th day of August, 1983. I further testify that all parties required to be served have been served.

Michael A. Nims
Attorney for Respondent